No. 02-316

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. WILD,

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC.; Y.E.S.! INC. a/k/a YOUTH EMPLOYMENT SERVICES, INC.; KARLEEN HILLERY; CHOAN LANE; JEREMY HOLMES; HEART OF TEXAS DODGE, INC.; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANY; PROGRESSIVE NORTHERN INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SUBSCRIPTIONS PLUS, INC. AND KARLEEN HILLERY

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STATEMENT PURSUANT TO RULE 29.6

Respondent Subscriptions Plus, Inc. (SPI), has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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Other Authority:

15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 101.90 (3d ed. 2001) 4

STATEMENT OF THE CASE

Petitioners Donald and Diana Wilds' Statement of the Case is incomplete. SPI and Hillery thus add the following facts and procedural history relevant to consideration of the Wilds' Petition.

Defendant/Respondent Allstate moved, among other things, to transfer this case from the Eastern District Court of Louisiana to the Western District of Wisconsin under 28 U.S.C. § 1406(a) on the grounds that the matter was not properly venued in the Louisiana district. (R. 1.) The Wilds' limited their opposition to the motion to arguments that venue was proper in that court and Allstate had not met its burden to show that there was good reason to transfer the case to Wisconsin. (R. 1.) The Louisiana district court held that venue was not proper in the Louisiana court, that it was in the interests of justice to transfer the matter and that the matter would therefore be transferred. (R. 1.)

After the matter was transferred to the Western District of Wisconsin, the Wisconsin district court granted the Wilds' motion to amend their complaint. (R. 16, 18.) The amended complaint included new allegations that venue was proper in the Western District of Wisconsin and that the court had personal jurisdiction over each of the defendants, including Karleen Hillery. (R. 19, ¶¶ 2-15.) On June 2, 2000, defendant Acceptance Insurance Company filed an answer to the amended complaint specifically alleging as an affirmative defense that the Wisconsin district court lacked personal jurisdiction over Hillery. (R. 33, p. 6.) Hillery's answer raised the same affirmative defense. (R. 38, p. 7.)

Hillery later moved for summary judgment on the ground that the Wisconsin district court did not have jurisdiction over her person. (R. 67, p. 2-3.) The Wilds opposed the motion, arguing that the Wisconsin district court did have jurisdiction over Hillery. (R. 116.) On December 6, 2000, the Wisconsin district court granted Hillery's motion. The court also granted summary judgment against the Wilds on virtually every single claim pending against the remaining defendants. (R.166; Petition Appendix ("Pet. App.") at 51a-52a.) It was only then — having all but lost — that the Wilds first claimed that lack of jurisdiction over Hillery may raise an issue as to whether the case had been properly transferred. (R. 201, pp. 3-4.) In a motion to transfer the case back to Louisiana, the Wilds argued that a retransfer was required by the Wisconsin district court's lack of jurisdiction over one of 13 defendants, even though virtually all of their claims had at that point already been dismissed on the merits. (*Id.* at pp. 3-4, 16-17.)

The Wilds lost their motion to retransfer and appealed. (R. 298.) During the pendency of the appeal, a Wisconsin state circuit court adjudicating claims of other victims of the van crash at issue in this case held that Wisconsin courts *did* have personal jurisdiction over Hillery under Wisconsin's long-arm statute. (Pet. App. at 6a-7a.) The Seventh Circuit, noting this decision, held that the Wisconsin district court did have jurisdiction over Hillery. (Pet. App. at 7a.) Had the district court not done so:

> Hillery would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscriptions Plus [also a defendant], would have gone down the drain with that claim. As it is, the claim against her remains

> alive in the district court [the second action[1]] — if barely, since the defendants have moved to dismiss it as barred by res judicata. Still, the plaintiffs are no worse off, or, in any practical sense, differently situated, than if the district judge had not mistakenly dismissed Hillery, thus raising the retransfer issue.

(Pet. App. 7a.) Recognizing that the case had been correctly dismissed as to all defendants, the Seventh Circuit affirmed. (Pet. App. at 12a.)

REASONS FOR DENYING THE PETITION

I. The Case Is Moot.

In their Petition, the Wilds have not challenged the Seventh Circuit's ruling that jurisdiction exists, meaning that the correctness of that ruling will not be questioned by this Court. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976) (if a ruling of the court below is not challenged in the petition for review, Court will not "pass on the correctness" of that ruling). The Wilds thus have no legally cognizable interest in the outcome of this case because, even if a transfer under § 1406(a) is invalid in some a case where the transferee court does not have personal jurisdiction over one of several defendants, in this case, jurisdiction was not lacking over any of the defendants. *See Powell v. McCormack*, 395 U.S. 486,

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1. The "second action" is the consolidated action consisting of two suits the Wilds brought against Hillery and the other defendants in Louisiana courts after the Wisconsin district court dismissed the Wilds' claims in the first action. (Pet. App. at 6a.) The second action stemmed from the same accident at issue in this case. The Louisiana court transferred the second action to the Wisconsin district court, where Hillery moved to dismiss on claim preclusion grounds. (*Id.*)

496 (1969) ("A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."); 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 101.90 (3d ed. 2001) (issue is moot if relief requested by judicial review would no longer serve any purpose). The Wilds' Petition should be denied.

II. THE SEVENTH CIRCUIT'S DECISION IS PROPER AND DOES NOT CONFLICT WITH ANY DECISION FROM THIS COURT OR ANY OTHER CIRCUIT COURTS.

The issue here, as the Wilds see it, is whether a transfer under § 1406(a) is invalid even though venue is proper in the transferee court as to all defendants, but one of the defendants is not subject to personal jurisdiction in the transferee court. (*See* Petition at 11.) The Seventh Circuit held that a transfer under those circumstances is entirely proper. (Pet. App. at 8a-10a, 12a.) The Wilds claim that this decision conflicts with this Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960) and with the decisions of other circuits. (*See* Petition at pp. 7-10 and cases cited therein.)

The Wilds are mistaken. *Blaski* and the circuit court cases the Wilds cite in their Petition differ factually from the present case in critically important respects and thus properly played no role in the Seventh Circuit's decision. The result in this case is not in conflict with the decisions of this Court, or the decisions of other circuits.

In the present case, it is undisputed that venue was proper in the Wisconsin district court as to all 13 defendants.[2] It has

2. Venue in the Western District of Wisconsin was premised on 28 U.S.C. § 1391(a) on the ground that a substantial part of the (Cont'd)

also never been disputed that the Wisconsin district court had personal jurisdiction over 12 of the 13 defendants. (R. 19, ¶¶ 2-15; R. 33, p. 6; R. 38, p. 7.) The parties hotly disputed whether Hillery was subject to personal jurisdiction in the Wisconsin district court. The Wilds (the *plaintiffs* in this case) took the position that the Wisconsin district court did have jurisdiction over Hillery — at least up until the time that the Wisconsin district court dismissed most of their claims.[3] (R. 19, ¶¶ 2-15; R. 116.)

Moreover, the Wisconsin district court's decision on whether Hillery was subject to personal jurisdiction in Wisconsin courts was not the last word on the issue. Months after that decision, a Wisconsin state court, addressing the identical personal jurisdiction issue in a proceeding arising from the identical van crash against the identical defendants,

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(Cont'd)
events or omissions giving rise to the claim occurred within the Western District. The Wisconsin district court so ruled (R. 211; Pet. App. at 18a), and the Seventh Circuit affirmed (Pet. App. at 6a, 12a.) The Wilds do not contest that determination in their Petition.

3. The Wilds complain in their Petition that the Wisconsin court "erroneously" placed on them the burden of establishing jurisdiction in response to Hillery's summary judgment motion because, they argue, a defendant moving for transfer under 28 U.S.C. § 1406(a) bears the burden of proving that the transferee court has jurisdiction over that defendant. (Petition at 2.) The Wilds' complaint has no merit. Hillery never sought a transfer under § 1406(a) (defendant Allstate brought that motion). (R. 1.) She did seek dismissal of the Wilds' claims based on lack of jurisdiction. (R. 68.) When a defendant challenges a court's jurisdiction over her person, it is the plaintiff's burden to establish that jurisdiction is proper. *Steel Warehouse of Wisconsin v. Leach*, 154 F.3d 712, 714 (7th Cir. 1998). The Wisconsin court thus correctly applied the law applicable to the situation before it.

disagreed with the Wisconsin district court and held that Wisconsin courts *did* have jurisdiction over Hillery under Wisconsin's long-arm statute.

Based on these very specific facts, the Seventh Circuit explained that even if the district court had lacked jurisdiction over Hillery (the court had already held that the district court *did* have jurisdiction), the lack of jurisdiction over one of 13 defendants would not have entitled the Wilds to a "retransfer" back to Louisiana. (Pet. App. 8a-10a, 12a.) True, the court did not address *Blaski*. But, there was no need to because *Blaski* did not address the very narrow issue that would have been before the Seventh Circuit had jurisdiction in fact been lacking over Hillery: whether lack of jurisdiction over one of 13 defendants where venue was proper as to all defendants required retransfer. 363 U.S. at 336-39, 344. Rather, *Blaski* addressed the (comparatively) straightforward issue of whether an action can be transferred to a district where neither venue nor jurisdiction are proper as to *any* defendant. *Id.*; *Van Dusen v. Barrack*, 376 U.S. 612, 620 (1964) (*Blaski* "held that, despite the defendant's waivers or consent, a forum which had been improper for *both* venue *and* service of process was not a forum where the action 'might have been brought'" for the purposes of § 1404(a)) (emphasis added). The Court held that where both venue and jurisdiction are lacking as to all defendants, the action is not one that "might have been brought" in the transferee court and the action could not be transferred. *Id.* at 344. This just makes sense. In such cases, if the original action had been filed in the transferee court to begin with, the *entire action* would have had to have been dismissed because it could not be maintained against any defendant. That is, there would be no one against whom the case could proceed at all.

In contrast to the situation addressed in *Blaski*, had the action in this case been commenced in the Western District of Wisconsin to begin with, the *action* as a whole would have properly proceeded in that court even though the *claims* against one of the defendants would have been dismissed for lack of jurisdiction. As the Seventh Circuit recognized, the action clearly "could have been brought" in the Wisconsin district court. (Pet. App. at 7a-8a.) In short, *Blaski* does not control here.

This case differs from *Blaski*, as well as from the other circuit court cases on which the Wilds rely in their Petition, in another critical way. None of the plaintiffs in those cases clearly waived an established right to challenge the transfer on the grounds that venue was wrong or that the transferee court lacked jurisdiction over one or more of the defendants. *See Blaski*, 363 U.S. 335; *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir. 1991); *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228 (D.C. Cir. 1981); *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984), *overruled on other grounds by In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987). Indeed, each plaintiff in those cases consistently asserted at the earliest point possible that venue was improper in the transferee court and/or that court did not have personal jurisdiction over all defendants.

Standing in sharp contrast to *Blaski* and the circuit court cases the Wilds cite in their Petition, the Wilds did *not* immediately object to and clearly waived any claim that the transfer was improper on personal jurisdiction grounds by failing to timely press the issue. The Wilds certainly had ample opportunity to raise the issue before they lost most of their case

on the merits. They could have objected to the transfer in the Louisiana district court on the grounds that the moving party — Allstate — had not demonstrated that venue and personal jurisdiction were proper in the transferee court as to all defendants. But they did not. (R. 1.)

They could have questioned the propriety of the transfer on personal jurisdiction grounds when the first answer to their amended complaint was filed specifically alleging lack of personal jurisdiction as to Hillery. Similarly, instead of arguing that the Wisconsin district court did have personal jurisdiction over Hillery in response to Hillery's summary judgment motion, (R. 116), the Wilds could have asked the court to stop the proceedings so that they could challenge the transfer based on Hillery's claim of lack of personal jurisdiction. The Wilds didn't do any of these things. They sat on their rights until after they lost, bringing the transfer motion as part of a transparent ploy to try their luck in some other court. They failed to promptly raise this issue even though it has long been the law in the Seventh Circuit that objections to transfers based on venue and/or personal jurisdiction grounds are waived if not timely pursued. *See National-Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989). Under these circumstances, the Wilds clearly waived any right to challenge the transfer on the grounds that the court lacked jurisdiction over the person of one of 13 defendants.

CONCLUSION

As explained above, this case is moot. In any event, the Seventh Circuit's decision is quite narrow, limited to the unique facts presented by this case. These facts, particularly the Wilds' waiver of any objection to the transferee court proceeding even though jurisdiction over one defendant was uncertain, were not present in *Blaski*, nor in any other circuit court decision mentioned by the Wilds in their Petition. There are basis for granting the Wilds' Petition and it therefore should be denied.

Respectfully submitted,

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